Public Comments Regarding Proposed Amendments to Iowa Rule of Civil Procedure 1.904 and Iowa Rule of Appellate Procedure 6.101 (due October 31, 2016)

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Proposed Amendments to Rules 1.904 and 6.101
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1 Attachment

29 Aug 16 Comments IRCP 1.904 Changes.docx

Jay Driesen
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August 29, 2016

Re: Proposed Amendments to Rules 1.904 and 6.101

Iowa Supreme Cout
1111 East Court Ave
Des Moines, IA 50319

Dear Distinguished Justices,

Although I normally do not get involved regarding proposed rule changes for the Rules of Civil Procedure, scanning through this notice I caught the 1.904 & 6.101 immediately.

As an active pro se relative to Elder Abuse and etc, I would strongly support clear definition of the tolling of time for appeal when a Motion to enlarge or reconsider is filed. I have seen District Court Judges even put the dates in their initial ruling regarding time tolling upon a 1.904 being filed.

I feel:

1) If a 1.904 is filed, the time for tolling an appeal should start from the time a ruling is submitted relative to the 1.904 motion.

2) The "proper" of the motion should also be clearly set forth.

3) Another problem enters the confusion which is when a party files a 1.904 motion. There are county judges who do not answer these even if the 1.904 motions are "proper". The filer files the 1.904 motion within the correct time and waits to hear something from the District Court. The filer believes that he/she will get an answer within 30 days. If that does not come even on a "proper" 1.904, that filer's appeal rights have then been destroyed.

Sorry I do not have time to go through many of your other proposed changes, but I can offer this word of advice. Human beings are not the greatest communicators. With increasing numbers of pro se people attempting to navigate our court system, when needless attacks are launched against them or their families, we find that we have these people on one hand and the well educated members of our court system on the other hand which can easily result in a disconnect of what is meant and what is comprehended.

This is what I have observed and do want to commend you folks in your attempt to bridge that gap and also to accommodate the pro se.

The "rule of law" is extremely important. I remain of the belief that the "rule of law" has broken down exceedingly especially if we view the national scene. As a part time pastor I also need to comment further. There is no law apart from and in contradiction to the Law of our Creator, the Ten Commandments and all that they stand for. I think of a few pertinent passages:

1) Psalm 2:10 ...be instructed, ye judges of the earth.

2) Proverbs 8:16 By me princes rule, and nobles, *even* all the judges of the earth.

But what is some sort of standard of the law of God that can be used in cases or controversies between citizens?

We find Mark 12:31 "And the second *is* like, *namely* this, Thou shalt love thy neighbour as thyself." For many in our country this is not true as they are more interested in spinning the lie unto their own advantage and I am sure you Justices know how well the lie can be spun.

Numbers 6:25 The LORD make his face shine upon thee, and be gracious unto thee:

In appreciation of your labors,

Jay Driesen

Proposed Amendment to Rules 1.904 and 6.101
Mark A. Roeder
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Hide Details
From: "Mark A. Roeder" <mroeder@mediacombb.net>
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2 Attachments

Supreme Court 9.6.16.pdf Auto Services v. KPMG 537 F.3d 853.docx

I am writing out of concern about newly proposed Rule 1.904. Please reconsider. It seems very problematic.

See attached correspondence, and case law.

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September 5, 2016

CLERK OF THE SUPREME COURT
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DES MOIN ES, IA 50319

RE: PROPOSED AMENDMENT TO RULES 1.904 AND 6.101 / SUGGESTION FOR SEPARATE JUDGMENT REQUIREMENT

Supreme Court Justices:

I am writing concerning the proposed amendments to Rule 1.904, and to add Rule 1.904(3), which states:

> **1.904(3)** *Motions to reconsider, enlarge, or amend other court orders, rulings, judgments, or decrees; time for filing.* In addition to proceedings encompassed by rule 1.904(1), a rule 1.904(2) motion to reconsider, enlarge, or amend another court order, ruling, judgment, or decree will be considered timely if filed within 15 days after the filing of the order, judgment, or decree to which it is directed.

Proposed Rule 1.904(3) appears inconsistent with the comment to the proposed amendment that states:

> The amended rule also is not intended to affect prior caselaw concerning a court's inherent authority to reconsider. *See Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393, 395–96 (Iowa 1988).

Insertion of new terms "reconsideration," and "other court orders, rulings," and "another court order, ruling" into Rule 1.904 creates ambiguities where there should be none. These are jurisdictional rules; they require clarity. The terms "reconsideration," and "another order" and "ruling" should be removed wherever found in proposed replacement Rule 1.904. These terms create murkiness.

We should not intermix terms. The term "reconsider" is not found in present Rule 1.904. Its insertion will create confusion with the case law addressing the traditional "motion to reconsider" not found in the Iowa Rules of Civil Procedure

that applies to nonfinal orders and rulings. Such motion ought to be available to a party any time before final judgment. *See e.g. Iowa Elec. Light and Power Co. v. Lagle*, 430 N.W.2d 393, 396 (Iowa 1996); *Mason City Prod. Credit Ass'n v. Van Duzer*, 376 N.W.2d 882, 885 (Iowa 1985); *State v. Kirschbaum*, 491 N.W.2d 199, 200 (Iowa Ct.App. 1992). The proposed rule casts the availability of the traditional "motion for reconsideration" allowed under our case law into doubt because of reference to a timeliness consideration in proposed Rule 1.904(3).

Under the proposed rule and quoted comment will prior rulings be reconsidered only *sua sponte* if a motion is not filed within 15-days? If a motion is filed ***after*** 15-days from an interlocutory order or ruling, will it preserve error, or not? The trial court still has jurisdiction to reconsider interlocutory orders after 15-days. Proposed Rule 1.904(3) creates chaos as to whether a nonfinal ruling or order requires a motion under Rule 1.904(2) within 15-days or the order. Or, whether such motion can still be filed within 15-days after final judgment.

A "partial summary judgments" and other interlocutory orders are not a final judgments that can be appealed. Rule 1.904(2) motions addressing errors in interlocutory orders should be required after final judgment, as in the federal system.

I propose an additional solution to help simplify jurisdiction, appeal time, and preservation of error. Adopt a rule complementary to Rule 58, Fed. R.Civ.P. At times in our state jurisprudence it is unclear whether a final judgment has been entered. The "separate judgment" requirement of Rule 58, Fed. R.Civ.P. brings needed clarity. Here is Rule 58's purpose: "[E]ntry of judgment on a separate document pursuant to Rule 58 triggers the running of the time limit for filing a notice of appeal and for filing postjudgment motions." *Williams v. Norris*, 461 F.3d 999 (8th Cir. 2006) *quoting Bonin v. Calderon,* 59 F.3d 815 (9th Cir.1995) (emphasis supplied). Adoption of the separate document requirement for judgments in civil cases would provide bright line guidance to parties, their attorneys, as well as to the court, concerning when Rule 1.904(2) motions are required, and when appeal time starts running.

Rule 59(e), Fed. R.Civ.P. allowing motions to alter or amend judgment is the complementary provision to Rule 1.904(2), Iowa R.Civ.P. The deadline for filing motions under Rule 59(e) Fed.R.Civ.P. does not apply to orders or rulings granting partial summary judgment. *See e.g. Advantedge v. Thomas E. Mestmaker & Assoc.,* 552 F.3d 1233 (10th Cir., 2009); *Deimer v. Cincinnati Sub-Zero Products, Inc.,* 990 F.2d 342, 346 (7th Cir. 1993). The federal model offers a good procedural practice model for Iowa to follow. In federal court interlocutory orders or rulings can be reconsidered *sua sponte* or on motion at any time before final judgment (as is true in Iowa), and are ultimately merged into the final judgment when entered by the Clerk on a separate document (which is very much in question under proposed Rule

1.904. In federal court, only after a final judgment is entered as to all issues, and the Clerk enters a judgment on a separate document under Rule 58, is deadline for filings motions to "alter or amend" under Rule 59(e) triggered. *Auto Services Co., Inc. v. KPMG, LLP*, 537 F.3d 853, 856-57 (8th Cir. 2008). This would be a better practice to follow in state court. It would cut down on motions in district court because many cases ultimately settle before trial.

If the Clerk were required to enter a separate "judgment" when judgment is final, it brings clarity where now there is ambiguity concerning the date by which Rule 1.904(2) motions must be filed, as well as bringing clarity to appeal deadlines for final judgments.

The proposed amendments to Rule 1.904 in my view add murkiness and ambiguity, and could promote disposition of cases upon procedural default, rather than on their merits, even if that is not the Court's intent by the proposed amendments.

Since motion and appeal deadlines go to the very jurisdiction and authority of the court to proceed, we should have clarity. Intermixing terms into this proposed rule, such as "reconsideration" with "alter or amend judgment" and adding a requirement that interlocutory orders and rulings be part of the "alter or amend" rule while seeming to somehow retain the trial court's ability to reconsider orders anytime before final judgment adds murkiness to how to preserve error for appeal of a final judgment or final order. We should with clarity adopt the federal merger rule that merges interlocutory orders and rulings into one final judgment for purpose of filing motions to alter or amend, and for purpose of appeal.

Adding a separate judgment requirement, such similar to Rule 58, Fed. R.Civ.P. would help bring clarity. If there is an area that begs for bright line rules, it is in error preservation and appeal deadlines because they are jurisdictional.

If the Court wants to limit interlocutory appeals where error was not preserved the Supreme Court can handle that by writing a rule directed solely at orders for which interlocutory appeals are taken. Perhaps the purpose here was to bring clarity to the interlocutory appeal process through this new proposal. However, it does not say it applies only to interlocutory appeals. And so it appears from its language it creates more serious issues than the limited issue it tries to solve.

Please consider a different approach.

Sincerely,

Mark A. Roeder

Mark A. Roeder

Motions to Alter or Amend Judgment and Merger: Where interlocutory order was entered dismissing fewer than all defendants, Motion to Alter or Amend Judgment under Rule 59(e) can only be filed after final judgment is entered as to all defendants. Prior to final judgment as to all defendants and all issues, plaintiff could, however, file a Motion to Reconsider.

537 F.3d 853
AUTO SERVICES COMPANY, INC., Plaintiff-Appellant,
v.
KPMG, LLP; KPMG Consulting, LLC; Milliman, Inc., Defendants,
Deloitte-Cayman Islands; Deloitte & Touche USA, LLP; Deloitte & Touche, LLP; Deloitte Consulting, LLP, Defendants-Appellees,
Berkley Insurance, Company; American Safety Insurance Services; American Safety Reinsurance Ltd.; Donald Erway; Dennis Costin; Rex Moats; Cayman Islands Firm of Deloitte & Touche; Winterbrook Re Intermediaries, LLC, Defendants.
No. 07-3164.
United States Court of Appeals, Eighth Circuit.
Submitted: May 14, 2008.
Filed: August 8, 2008.

[537 F.3d 854]

Terry J. Grennan, argued, David A. Blagg, on the brief, Omaha, NE, for appellant.

Jennifer L. Conn, New York, NY, Robert W. Perrin, Los Angeles, CA, argued, Robert M. Gonderinger, David J. Skalka, Michael L. Schleich, Omaha, NE, Aric H. Wu, New York, NY, Miles N. Ruthberg, Julie R.F. Gerchik, Los Angeles, CA, on the brief, for appellees.

Before RILEY, BOWMAN, and HANSEN, Circuit Judges.

BOWMAN, Circuit Judge.

Auto Services Company, Inc., ("ASC") appeals the District Court's dismissal of its

[537 F.3d 855]

claims against Deloitte-Cayman Islands; Deloitte & Touche, USA, LLP; Deloitte & Touche, LLP; and Deloitte Consulting, LLP (collectively, "the Deloitte entities"), and the court's denial of its motion to reconsider the dismissal. We affirm.

On June 3, 2005, ASC, an Arkansas corporation engaged in marketing vehicle warranties, filed a lawsuit against the Deloitte entities and the other defendants. ASC asserted professional-negligence claims against the Deloitte entities in the preparation of financial documents for National Warranty Insurance Risk Retention Group ("National Warranty"), a Cayman Islands company headquartered in Nebraska that provided vehicle-warranty insurance to its members, including ASC. National Warranty initiated liquidation proceedings in 2003 and thereafter ceased providing contracted-for insurance coverage for ASC's vehicle warranties. According to ASC's complaint, the 1998 through 2001 financial reports, audits, and actuarial opinions ("audit reports") prepared by the Deloitte entities for National Warranty and provided to ASC as a National Warranty group member contained material misrepresentations and omissions, understated National Warranty's liabilities, and ultimately caused ASC to incur losses when National Warranty ceased performing

its obligations under the vehicle-warranty insurance contracts.

On December 12, 2006, the District Court dismissed ASC's claims against the Deloitte entities, concluding that those claims were barred by Nebraska's two-year statute of limitations on professional-negligence actions. The case against the other defendants, however, continued. On June 29, 2007, the District Court entered a "Consent Final Judgment and Order" dismissing ASC's claims against KPMG, LLP, the last defendant remaining in the lawsuit.

On July 13, 2007, ASC filed a motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure requesting that the District Court reconsider its December 12, 2006, dismissal of ASC's claims against the Deloitte entities. Specifically, ASC argued that issues of fact remained and that the court erred by concluding as a matter of law that Nebraska's two-year statute of limitations on professional-negligence actions barred ASC's claims against the Deloitte entities. On August 16, 2007, the District Court entered an order denying as untimely ASC's motion for reconsideration. Citing a local rule requiring that "a motion for reconsideration of an order [be filed] no later than ten (10) business days after the court files the order," NECivR 60.1(b), the District Court concluded that ASC's right to seek reconsideration of the December 12, 2006, dismissal order had expired. On September 14, 2007, ASC filed its notice of appeal, asserting that the District Court erred by denying its motion to reconsider as untimely under the local rules and by dismissing its underlying claims against the Deloitte entities as untimely under Nebraska's professional-negligence statute of limitations.

A "motion for reconsideration" is not described in the Federal Rules of Civil Procedure, but such a motion is typically construed either as a Rule 59(e) motion to alter or amend the judgment or as a Rule 60(b) motion for relief from judgment. *See, e.g., Sanders v. Clemco Indus.*, 862 F.2d 161, 168 (8th Cir.1988). Here, because ASC identified Rule 59(e) as the operative authority and called into question the correctness of the District Court's judgment, we will treat the motion as one to alter or amend the judgment under Rule 59(e). *See Norman v. Ark. Dep't of Educ.*, 79 F.3d 748, 750 (8th Cir.1996). We review the District Court's denial of the motion for abuse of discretion. *See id.*

[537 F.3d 856]

A motion to alter or amend the judgment must be served no later than ten days after the entry of "the judgment," Fed.R.Civ.P. 59(e), and, if timely filed, tolls the time in which to file a notice of appeal until the district court disposes of the motion, Fed. R.App. P. 4(a)(4)(A)(iv). For purposes of the Federal Rules of Civil Procedure, "judgment" is defined to "include[] a decree and any order from which an appeal lies." Fed.R.Civ.P. 54(a). Thus, "judgment" encompasses both a final judgment and an appealable interlocutory order. "Judgment" does not, however, encompass an order dismissing fewer than all of the opposing parties or claims unless the district court directs the entry of final judgment under Rule 54(b), or expressly indicates that the order is an immediately appealable interlocutory decision under 28 U.S.C. § 1292(b). *Wagner v. Farmers & Merchs. State Bank,* 787 F.2d 444, 445 (8th Cir.1986) (per curiam). Because an order dismissing fewer than all claims or parties is generally not a final judgment, a Rule 59(e) motion to challenge such an order may only be filed after the district court enters the final judgment. *Maristuen v. Nat'l States Ins. Co.,* 57 F.3d 673, 679 (8th Cir.1995) (reasoning that a Rule 59(e) motion "would have been premature had it been filed within ten days of" an order that was not a final judgment); *Barton v. Columbia Mut. Cas. Ins. Co.,* 930 F.2d 1337, 1338 n. 2 (8th Cir.1991) (noting that the district court's

judgment denying a motion for a new trial and disposing of all remaining claims "effectively terminated the controversy," thus rendering final a "previously interlocutory ... [o]rder dismissing plaintiffs' unrelated claims").

Here, the District Court's December 12, 2006, order dismissing ASC's claims against the Deloitte entities was not a final judgment because it dismissed fewer than all of the claims asserted in ASC's lawsuit. *See Chambers v. City of Fordyce, Ark.*, 508 F.3d 878, 880 (8th Cir.2007) (per curiam) (noting that an order dismissing fewer than all claims or defendants is only final after judgment is entered); *Missouri ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1105 (8th Cir.) (observing that an order dismissing all claims against one defendant was not final when entered because other defendants remained), *cert. denied*, 527 U.S. 1039, 119 S.Ct. 2400, 144 L.Ed.2d 799 (1999); *Bullock v. Baptist Mem'l Hosp.*, 817 F.2d 58, 59 (8th Cir. 1987) (holding that an order dismissing the complaint as to fewer than all defendants is not a final judgment). And the District Court did not direct the entry of final judgment under Rule 54(b) or indicate that the order was an immediately appealable interlocutory decision under § 1292(b). Not until June 29, 2007, when the District Court entered its "Consent Final Judgment and Order" dismissing the claims against the last remaining defendant, was the final judgment entered and the lawsuit effectively terminated. Only then could ASC file a Rule 59(e) motion to alter or amend the judgment — including the December 12, 2006, dismissal order and the other orders previously entered in the case. *See Broadway v. Norris*, 193 F.3d 987, 989 (8th Cir. 1999) ("Rule 59(e) motions are motions to alter or amend a *judgment*, not any nonfinal order."); *Maristuen*, 57 F.3d at 679; *Barton*, 930 F.2d at 1338-39 n. 2; *Anderson v. Deere & Co.*, 852 F.2d 1244, 1246 (10th Cir.1988) (concluding that earlier interlocutory orders dismissing certain defendants "merged" with judgment dismissing last defendant for purposes of finality). Had ASC elected to seek reconsideration of the dismissal order before final judgment was entered, it could have filed a motion to reconsider pursuant to the local rule cited by the District Court. *See* NECivR 60.1(b). Or ASC could have moved the District Court

[537 F.3d 857]

to exercise its general discretionary authority to review and revise its interlocutory rulings prior to the entry of final judgment. *See* Fed.R.Civ.P. 54(b); *Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 100, 74 S.Ct. 414, 98 L.Ed. 532 (1954) (observing that "[t]he power remained in the trial court until the entry of his final judgment to set aside, for appropriate reasons," orders previously entered in the case); *Interstate Power Co. v. Kansas City Power & Light Co.*, 992 F.2d 804, 807 (8th Cir.1993) ("Under the last clause of Rule 54(b), a non-final order `is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.'").

The District Court denied ASC's motion to reconsider based on a local rule stating that "[a] party must file a motion for reconsideration of an order no later than ten (10) business days after the court files the order." NECivR 60.1(b). As we have concluded, however, ASC's motion to reconsider was timely filed pursuant to Rule 59(e), which "expressly authorizes the filing of motions to alter or amend a judgment. Litigants have a right ... to file such motions." *DuBose v. Kelly*, 187 F.3d 999, 1002 n. 1 (8th Cir.1999). While the local rule cited by the District Court may apply to motions for reconsideration of a court's interlocutory rulings, "[w]e doubt that the local rule was intended to apply to post-judgment motions filed within the time limit prescribed in" Rule 59(e). *Id.* (construing a Minnesota local rule governing motions to reconsider); *see* Fed.

R.Civ.P. 83 (instructing that district courts may adopt local rules not inconsistent with the federal rules). In sum, we conclude that the District Court abused its discretion by denying as untimely under a local rule ASC's motion for reconsideration filed pursuant to Rule 59(e).[1]

This does not end the matter, however. Although the District Court abused its discretion by denying ASC's Rule 59(e) motion as untimely under a local rule, we conclude that this error was harmless because the court did not err in dismissing the underlying professional-negligence claims against the Deloitte entities. *See Anderson,* 852 F.2d at 1246 (concluding that the district court's erroneous ruling on the timeliness of a Rule 59(e) motion was harmless error); *cf. Rodriguez-Antuna v. Chase Manhattan Bank Corp.,* 871 F.2d 1, 3 (1st Cir.1989) (holding that erroneous treatment of a rule 59(e) motion was harmless because there was no valid basis for relief in any event).

The District Court dismissed ASC's claims against the Deloitte entities as time-barred under Nebraska's two-year statute of limitations for professional-negligence actions. Neb.Rev.Stat. § 25-222.[2] This section provides that "[a]ny action to recover damages based on alleged professional negligence ... shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action." *Id.* The two-year limitations period "begins to run as soon as the cause of action accrues." *Berntsen v. Coopers & Lybrand,* 249 Neb. 904, 546

[537 F.3d 858]

N.W.2d 310, 315 (1996). With respect to a claim alleging professional negligence against an auditor, the cause of action accrues, and the two-year statute of limitations begins to run, on the date the audit report is delivered to the client. *World Radio Labs., Inc. v. Coopers & Lybrand,* 251 Neb. 261, 557 N.W.2d 1, 10 (1996).

The two-year limitations period may be extended, however, "if facts constituting the basis of the malpractice action are not discovered and could not reasonably be discovered within 2 years of the alleged negligent conduct." *Id.* In such a case, section 25-222's discovery exception permits "a malpractice action to be brought within 1 year from the date of discovery or within 1 year from the date the plaintiff acquires facts that would lead to such discovery." *Id.* Discovery "occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action." *Gering-Fort Laramie Irrigation Dist. v. Baker,* 259 Neb. 840, 612 N.W.2d 897, 903 (2000); *see Weaver v. Cheung,* 254 Neb. 349, 576 N.W.2d 773, 778 (1998) ("In the context of statutes of limitations, `discovery' refers to the fact that one knows of the existence of an injury or damage, regardless of whether there is awareness of a legal right to seek redress in court."). If a plaintiff discovers its cause of action at *any time* within the two-year limitations period, however, the one-year discovery exception does not apply. *Carruth v. State,* 271 Neb. 433, 712 N.W.2d 575, 580 (2006); *Egan v. Stoler,* 265 Neb. 1, 653 N.W.2d 855, 860 (2002) ("[T]he 2-year statute of limitations is applicable notwithstanding the fact that the plaintiff may not discover the cause of action until shortly before the expiration of the time period.").

Here, ASC asserted claims of professional negligence against the Deloitte entities in the preparation of audit reports for National Warranty for the years 1998 through 2001. Attached as Exhibit 2 to ASC's amended complaint was a letter from the Deloitte entities dated February 11, 2002, transmitting the National Warranty audit reports for the years ending December 31, 2000, and

December 31, 2001. Based on the date of the letter, the District Court reasoned that the 2001 audit report (and the audit reports for all preceding years) would have been delivered to ASC no later than "late February or early March 2002." Order of Dec. 12, 2006, at 7.[3] Any potential claims against the Deloitte entities related to the 2001 (or earlier) audit reports accrued — and the two-year statute of limitations began to run — no later than March 2002, the latest date on which the audit reports would have been delivered. *See World Radio Labs., Inc.,* 557 N.W.2d at 10. ASC did not file its complaint, however, until June 3, 2005, roughly fifteen months after the two-year limitations period had lapsed. The District Court did not err in concluding that ASC's professional-negligence action against the Deloitte entities was time-barred.

ASC argues that because it could not have discovered the Deloitte entities' alleged negligence until "shortly before this lawsuit was filed," section 25-222's one-year discovery exception applies. Amended Complaint ¶ 77. Like the District Court, we find this argument unavailing.

[537 F.3d 859]

In its amended complaint, ASC acknowledged that National Warranty initiated liquidation proceedings on June 4, 2003, and averred that National Warranty ceased performing under its vehicle-warranty insurance contracts with ASC at that time. *Id.* ¶¶ 18, 19. ASC further alleged that National Warranty's failure to perform under the contracts resulted in damages in excess of $10,000,000. *Id.* ¶ 19 ("ASC has paid for repair costs out of its own pocket...."). This information was "sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action." *Gering-Fort Laramie Irrigation Dist.,* 612 N.W.2d at 903. By its own admission, ASC knew or should have known of its professional-negligence action against the Deloitte entities when, in June 2003, National Warranty filed for liquidation and ceased paying claims on its insurance contracts. *See Reinke Mfg. Co. v. Hayes,* 256 Neb. 442, 590 N.W.2d 380, 390 (1999) (noting that "[i]t is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only that a problem exists"). And because ASC knew or should have known of its negligence action against the Deloitte entities within two years of the March 2002 delivery of the audit reports, the time for filing its claims against the Deloitte entities was not tolled by the discovery exception. Moreover, even if the one-year discovery exception were applicable, ASC's complaint would nevertheless be time-barred because it was filed on June 4, 2005, more than one year after the June 3, 2003, discovery date.

Accordingly, we affirm the judgment of the District Court.

Notes:

1. Because ASC timely filed its Rule 59(e) motion to alter or amend the judgment (including the previously interlocutory order dismissing the Deloitte entities), the time for ASC to file its notice of appeal began to run on August 16, 2007, the date on which the District Court disposed of the Rule 59(e) motion. Fed. R.App. P. 4(a)(4)(A)(iv). ASC's notice of appeal, filed on September 14, 2007, was timely and preserved for our consideration the underlying dismissal order.

2. The parties agree that Nebraska Revised Statutes section 25-222 applies.

3. Although ASC asserts that the dates on which the 1998 and 1999 audit reports were delivered "cannot be determined from the Amended Complaint," Br. of ASC at 65, ASC does not suggest that the 1998 and 1999 audit reports were delivered *after* the reports for the years 2000 and 2001. The District Court

did not clearly err in finding that the 1998 and 1999 audit reports were delivered before the 2000 and 2001 audit reports.

Proposed Amendments to Rules 1.904 and 6.101
Iowa Academy of Trial Lawyers
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1 Attachment

In the Iowa Supreme Court #3.docx

AMENDED COPY

In the Iowa Supreme Court

Amended Comment of Iowa Academy of Trial Lawyers on Proposed Amendments to Iowa Rule of Civil Procedure 1.904 and Iowa Rule of Appellate Procedure 6.101

Subject: Proposed Amendments to Rule 1.904 Iowa Rules of Civil Procedure and Rule 6.101 Iowa Rules of Appellate Procedure

COMES NOW the Iowa Academy of Trial Lawyers and makes the following comments and suggestions to Proposed Amendments to Rules 1.904 and 6.101.

1. The Iowa Academy of Trial Lawyers (Academy) is composed of Fellows who, as members of the Iowa Bar, have been reviewed by their peers and nominated for and invited to fellowship as a result of their specialized education, training, and experience in litigation and advocacy. Fellows of the Academy constitute the leading members of the Iowa trial bar. The Academy is a non-partisan association, and is neither plaintiff- nor defendant-oriented. The Academy is dedicated to the principles of fairness and justice for all in the courts of Iowa and as such is concerned about the process by which these are attained. Membership in the Academy is limited to 250 attorneys whose primary dedication is to trial practice. Membership is by invitation only, with unanimous approval of the Board of Governors.
2. The proposed changes to the rules relate to the timeliness of appeals when the notice of appeal is filed more than 30 days after the original court order or judgment, but within 30 days after an order to reconsider, enlarge, or amend that order or judgment. The Bar has expressed multiple concerns about the current state of the law as noted in the courts' order and its reference to Hedlund v State, 875 N.W. 2d 720, 725 (Iowa 2016).
3. The court has redrafted these rules to clarify that a timely 1.904 (2) motion tolls the time for appeal. This clarification was needed to do justice and provide a clearer path to the bench and bar on what has been a confusing, at best, set of rules and cases interpreting same.
4. The Academy fully supports the proposed amended Rules 1.904 and 6.101.

Respectfully Submitted,

David L. Brown
Secretary-Treasurer
Iowa Academy of Trial Lawyers

Proposed Amendments to Rules 1.904 and 6.101
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1 Attachment

Proposed Amendment to Rules 1.904(2) and 6.101(1).docx

Attached for the Court's consideration are proposed amendments to Rules 1.904 and 6.101. Best regards,

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Proposed Amendment to Iowa Rule of Civil Procedure 1.904(2):

On motion joined with or filed within the time allowed for a motion for new trial, the findings **of fact** and conclusions **of law drawn therefrom** may be enlarged or amended and the judgment or decree modified accordingly or a different judgment or decree substituted. But a party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without having objected to it by such motion or otherwise. Resistances to such motion and replies may be filed and supporting briefs may be served as provide in rules 1.431(4) and 1.431(5).

Proposed Amendment to Iowa Rule of Appellate Procedure 6.101(1):

b. *All other cases.* A notice of appeal must be filed within 30 days after the filing of the final order or judgment **including an order granting a motion made pursuant to Iowa R. Civ. P. 1.421(1)**. However, if a motion is timely filed under Iowa R.Civ. P. 1.904(2) or Iowa R. Civ. P. 1.1007, the notice of appeal must be filed within 30 days after the filing of the ruling on such motion.

From: Ryan Koopmans <RKoopmans@nyemaster.com>
To: "Molly.Kottmeyer@iowacourts.gov" <Molly.Kottmeyer@iowacourts.gov>,
Date: 10/31/2016 03:56 PM
Subject: Rule 1.904(2)

Molly,

I have a belated comment on the amendments to Rule 1.904(2) and 6.101. As you know, I'm supportive of amending those rules to make clear (without any need for case law) when the time to appeal is tolled. The proposed changes do that.

My one concern is that cases could become bogged down if every 1.904(2) motion tolls the time to appeal. I think 1.904(2) motions are probably filed too often already; if attorney's aren't fearful of running past the time deadlines, I think the number could increase significantly, without any significant corresponding increase in the number of meritorious motions. If those meritless motions are rejected quickly, that's not a problem. My concern is that, often times, they won't be.

That might be an unwarranted concern; I don't have statistical evidence that shows how long judges take to rule on these motions. And separating the meritorious ones from the non-meritorious ones (that are rejected in one sentence, but three months after the motion is filed) is not something that can be done statistically. But if the justices and district court judges have that fear, then I think there's an alternative that would go something like this:

(1) Rule 1.904(2) would remain a rule that applies only to post-trial motions in a bench trial. Nothing else. That would mean deleting the rules that make 1.904(2) apply to motions for summary judgment and orders on judicial review. All 1.904(2) motions—meaning only post-trial motions in a bench *trial* would toll the time for appeal.

(2) Create a new rule for a "motion to reconsider" under which a losing party can file a motion to reconsider any order, interlocutory or final. The motion would act in some ways like a petition for rehearing with the Supreme Court: It would be denied as a matter of law if the court hasn't taken action within 30 days, but "take action" doesn't necessarily mean "issue an order on the merits of the motion." If the judge "grants" the motion to reconsider, that simply means that the judge has read it and deemed it significant enough to dig deeper into the arguments or claims. Once the motion is granted, the judge can take all the time he or she needs to rule on the motion.

(3) When a "motion to reconsider" is filed, the 30-day deadline to appeal is *not* tolled. But if the court grants the motion, then the time period is tolled until the judge issues an order on the merits of the motion.

(4) Finally, for purposes of error preservation: If the a party files a motion to reconsider and says "Court, you didn't rule on this argument I made," and the judge doesn't take action on the motion within the 30-day period, then error on that issue is preserved as the court is deemed to have rejected it. If that issue is one that is

reviewed for abuse of discretion, then as a practical matter the Supreme Court may want to remand it with directions to issue an order on the issue.

Like the proposed change, parties will always know where they stand in terms if timeliness of appeal. But this other option has the benefit of moving cases along in a world in which a lot of meritless motions to reconsider are filed and judges aren't issuing orders quickly enough.

In my experience, a successful motion to reconsider is short and gets to the point: "Judge, you missed this fact, which would change everything." Or "Judge, you cited this case to support that conclusion, but that case has been overruled." Those kinds of statements jump out at the reader and are ones that the district court judges should catch right away. When that happens, the judge can grant the motion and then take time to consider the merits.

If the motion doesn't grab the judge within the 30-day time period, then it's likely that it never will. Logically, the judge would quickly issue an order denying a meritless motion that does nothing more than say "You got it wrong, for the reasons I stated in my earlier brief." But that task often seems to get put on the backburner, which means that the case sits dormant for months at a time.

But again, all of this should be taken with a grain of salt, as it's based upon anecdotal experience rather than any statistical sampling. If meritless 1.904(2) motions are being ruled upon in a timely fashion (and it is the meritless ones that I'm targeting), then the proposed change is the best way to go. But if judges are frequently denying 1.904(2) motions outright, weeks or months after they're filed, then setting in place some kind of exploding deadline could push the cases along. But if the judge thinks that the motion has merit, then he or she can grant the motion and then can get as much time as he or she needs to look at the merits. So this rule wouldn't necessarily rush judges; it would just make them have to take an initial look at the motion and decide whether it passes the smell test.

If you have any thoughts or would like to discuss this issue further, I'd be happy to do so. Thanks for your work on this issue. I can tell you that the debate of "will it or won't it toll the deadlines" is one that is frequently had in this firm and one that costs clients a lot of money. So any change that can fix that issue is a good one.

Ryan G. Koopmans

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[BULK] Proposed Amendments to Rules 1.904 and 6.101
Thomas Mayes
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rules.comments
10/30/2016 09:39 PM
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From: Thomas Mayes <thomas.a.mayes@gmail.com>
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1 Attachment

1.904 comments.pdf

Please see attached comment

Via Electronic Mail

October 30, 2016

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RE: Comments to Proposed Amendments to Rules 1.904 and 6.101

Dear Colleagues:

I have been an Iowa attorney for twenty years and am an occasional commenter on Iowa practice. *See, e.g.*, Mayes & Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39 (2006). I support the proposed amendments as written. These rules, as amended, would provide welcome clarity to litigants, counsel, and judges, while eliminating a large amount of unnecessary uncertainty and confusion. The confusion surrounding whether a motion under current rule 1.904 is proper creates an incentive for parties to avoid requesting relief from the trial court and to needlessly and prematurely file a notice of appeal.

The crisp line that the proposed rules draws will return the focus to where it should be in these circumstances: whether the order, judgment, or decree should be amended or enlarged.

Thank you for proposing these amendments, and I urge their swift adoption.

Sincerely,

Thomas A. Mayes